



HAWAII CIVIL RIGHTS COMMISSION

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MINUTES

Hawai'i Civil Rights Commission Office

February 23, 2015

1:30 p.m.

Present: Linda Hamilton Krieger, Raymund Liongson, Kim Coco Iwamoto, and Wally Fukunaga, Commissioners; Livia Wang, Bill Hoshijo, and Marcus Kawatachi, Staff; Francine Wai, Executive Director of DCAB, was also in attendance.

Artemio Baxa, Commissioner, excused.

Chair Linda Hamilton Krieger called the meeting to order.

Approval of Minutes

The minutes of the January 26, 2015, meeting, continued to and completed on February 2, 2015 were approved. (m/s/p Liongson/Fukunaga; all in favor).

Executive Director's Report

Deputy Executive Director (DED) Marcus Kawatachi's reported on FY 2015 HCRC Mediation Program Year-to-Date progress, noting that seven additional cases had been referred to mediation.

Summary & Details (7/1/14 through 2/23/15)

Referrals:	18
Dispositions:	19
Settlements:	10
Non-agreements:	9
Settlement Rate:	52.6 %
Employment cases settled:	10
Non-employment cases settled:	0
Dual-filed (EEOC/HCRC) settlements:	8
State-only settlements:	2

Primary Bases for Complaints Settled in Mediation

Sex (3 pregnancy & 1 SH)	6 (3 pregnancy and 3 sexual harassment)
Race	2
Ancestry/National Origin	1
Disability	1

Dispositions by Mediation Center

Mediation Center of the Pacific	5/11 (settlement rate 45.5 %)
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Kauai Economic Opportunity, Inc.	2/3	(settlement rate 66.7%)
West Hawaii Mediation Center	1/2	(settlement rate 50 %)
Private Mediators	2/2	(settlement rate 100 %)
Ku'ikahi Mediation Services (Hilo)	0/1	(settlement rate 0 %)
Mediation Services of Maui	0/0	(settlement rate 0%)
OVERALL	10/19	(settlement rate 52.6%)

DED Kawatachi presented a data and production report showing caseload data through February 23, 2015.

As of February 23, 2015, the report showed 373 open cases, an increase of 9 cases from the number reported as of January 26, 2015. Of those, 3 (0.8%) were filed in 2009, 10 (2.7%) filed in 2010, 23 (6.2%) filed in 2011, 45 (12.1%) in 2012, 88 (23.6%) in 2013, 165 (44.2%) in 2014, and 39 (10.4%) in 2015.

The report also showed a breakdown of the status of the open cases by investigation stage.

	2009	2010	2011	2012	2013	2014	2015	Total
Housing Cases	0	0	1	5	2	12	3	23
Intake Stage	0	0	2	0	34	116	34	186
Mediation	0	0	0	1	5	23	0	29
Pending Assignment	0	0	13	35	35	8	1	92
Active Investigation	3	10	7	4	12	6	1	43
TOTAL	3	10	23	45	88	165	39	373

It was reported that: 22.8% of all investigation cases were 2 years old or older (from date of filing); 11.8% were over 18 months but less than 2 years old; 15.8 % were over 12 months but less than 18 months old; 15.8% were over 6 months but less than 12 months old, and 33.8% were 6 months old or less.

DED Kawatachi reported that no administrative subpoenas were issued.

Executive Director (ED) Hoshijo reported on the January 2015 Hawai'i Supreme Court Decision in *Shimose v. Hawai'i Health Systems Corporation*, which interpreted "rational relationship" between a record of conviction and the duties and responsibilities of a job position much more narrowly than it had been before.

Legislation -2015 Session

ED Hoshijo reported that there was nothing new to report on the status of the FB 2015-2017 budget request.

The Commissioners reviewed Legislative Summary 3, with staff recommendations prepared by CC Wang. The Commissioners also reviewed HB No. 52, which was not included in Legislative Summary 3, but was brought to ED Hoshijo's attention just prior to the meeting.

The Commissioners decided on HCRC positions on bills not previously reviewed and discussed as follows:

HB 819 HD1 Bullying; Safe Schools for All Students {SB 845}

Requires certain state entities and grantee to adopt bullying prevention policies,
Establishes a task force to assist the Governor with bullying prevention policies in the state, amends HRS § 302D-34 to include gender identity or expression as a basis for protection against discrimination by a public charter school.

Status: HB 819 ref. to EDN, JUD; hrg. before EDN on 2/4, deferred to 2/11, passed w/ amendments adding county agencies and contractors who work with youth, deleting references to age in definition of youth, requiring bullying prevention programs to align with health education standards and adding an unspecified appropriation for the task force

SB 845 ref. to EDU/SHS, JDL/WAM; hrg. before EDN/SHS on 2/4, deferred to 2/5, deferred.

Discussion: Commissioner Kim Coco Iwamoto recommended that the HCRC strongly support the bill. Chair Krieger suggested that the language in Part III, Section 6, be amended to expressly state the protection against discrimination based on "sex, including gender identity or expression."

HCRC position: Strongly support but suggest that part III section 6 be amended to state "sex, including gender identity or expression" (m/s/p Iwamoto/Fukunaga; all).

HB 1272 HD1 Closed Movie Captioning and Descriptive Narration in Motion Picture Theaters

Amends HRS § 347 to require motion picture theaters that have 2 or more facilities to provide closed movie captioning and descriptive narration for at least 2 showings per week of a motion picture.

Status: ref. to EPBCPC/JUD; hrg. before EPB on 2/10, passed w/ amendments requiring open captioning and descriptive narration in theaters having 2 or more facilities during at least 2 showings a week, making a violation of the statute a discriminatory practice, placing enforcement under HRS Chapter 489 and directing the DLIR director to adopt rules to this effect.

Discussion: DCAB Executive Director Francine Wai provided background information on the purpose

of the bill. She explained that the major change that the bill will require is showings with open captioning, or subtitles. The U.S. Department of Justice has proposed rules that require closed captioning, which is viewed through special glasses. If the bill is enacted, state law will be stronger than federal law in that respect. She said that all major studios produce films with open captioning, closed captioning, and descriptive narration embedded in the digital media. Chair Krieger recommended support, with the suggestion that the legislature clearly define “motion picture theater” and “facility.”

HCRC position: Support, with request to amend by deletion of the provision requiring the Director of Labor and Industrial Relations to adopt rules, because any rules would be adopted by the HCRC, and rulemaking would not be necessary where the statute is so specific; also, with suggestion that “motion picture theater” and “facility” be clearly defined.(m/s/p Krieger/Fukunaga; all).

HB 52, HD1 Relating to Selective Service

Requires compliance with the Military Selective Service Act to be eligible for enrollment in a state-supported post-secondary institution, qualify for state financial assistance for post-secondary education, or be eligible for state or county employment. Application limited to persons between the age of eighteen and twenty-six years of age, who are US citizens or lawful permanent residents, who are not otherwise excused from compliance with the Military Selective Service Act.

Status: HB 52 ref. to VMI, HED, FIN; hrg. before VMI on 2/2, deferred to 2/9, passed; hrg. before HED on 2/12, passed as amended HD1; hrg. before FIN scheduled for 2/25.

Discussion: Chair Krieger noted that the law would be limited in application only to males, imposing a burden on males in a discriminatory fashion, counter to the State constitutional protection against sex discrimination.

HCRC position: Strongly oppose, because of sex discrimination. (m/s/p Kreiger/Iwamoto; all).

CC Wang also reviewed the status of bills the Commissioners previously reviewed and discussed as follows:

CIVIL RIGHTS COMMISSION

HB 683 HCRC – ED Authority to Dismiss Complaints SB 362

Amends HRS §368-13 to authorize ED to dismiss a complaint and issue a notice to sue if cause is found and conciliation fails

**Status: HB 683 ref. to LAB, JUD; hrg. before LAB on 2/17, passed unamended
SB 362 ref. to JDL**

HCRC position: Support. This is the bill originally submitted as part of the admin. package; emphasize

how this will save staff time and costs.

NOTE: HUD requires housing cases exempted from this authority.

EMPLOYMENT

[HB-244] Employment Discrimination; Labor; Smoking SB 1005

Amends H.R.S. § 378-2((a) to prohibit discrimination against, or terminating an employee solely for the employee's use of tobacco products outside of working hours. Exempts organizations whose primary purpose is to discourage the use of tobacco products by the general public.

Status: HB 244 ref. to LAB, JUD
SB 1005 ref. to JDL

HCRC position: Oppose. The Commission opposes piecemeal regulation of employee behavior outside of working hours; should not be placed under HCRC jurisdiction because of budget constraints.

HB 536 HD2 Government Contractors; Pay Equity SB 728 SD1

Amends HRS Ch. 103 to require government contractors to give equal pay for men and women who do similar work and requires government contractors to report wages paid to employees by gender. Also provides for penalties for pay equity violations.

Status: HB 536 ref. to LAB, JUD, FIN; hrg. on 2/3 before LAB, passed w/ requested Amendments, hrg. before JUD on 2/17, passed w/amendments
SB 728 ref. to GVO/JDL, WAM; hrg. on 2/10 before GVO/JDL, passed w/ requested amendments

HCRC position: Support with proposed amendments to delete last sentence in proposed § 103-____(a) on page 3. Similar to protections under OFCCP; keep enforcement under HRS Ch. 103.

HB 561 HD1 Personal Social Media Account; Privacy, Employment SB 1269

Amends HRS Ch. 378 Part I to prohibit employers from requiring or requesting employees and applicants to grant access to personal social media account user names and passwords

Status: HB 561 ref. to LAB, JUD; hrg. on 2/3 before LAB, passed w/ requested amendments
SB 1269 ref. to JDL

HCRC position: Support intent with amendment to delete section (e) and urge placement in a new part of HRS Ch. 378 and provide direct cause of action in court with injunctive relief and attorneys' fees. In pre-employment and employment context, information related to protected bases gained from social media accounts is already prohibited by HRS § 378-2.

**HB 684 HD1 Employer Liability; Adding Federal Law Faragher/ Ellerth Defenses
SB 1012**

Amends HRS Chapter 378 to allow affirmative defenses for supervisor discriminatory conduct if supervisor's conduct does not result in adverse tangible employment action. "Adverse tangible employment action" defined as including, but not limited to, firing, failure to promote, assigning of significantly different responsibilities, and significantly reducing benefits of an employee. "Supervisor" defined as a person who is employed and empowered by the employer to take tangible employment actions towards the employee (from U.S. Supreme Ct. decision in *Vance v. Ball State*.)

**Status: HB 684 ref. to LAB, JUD; hrg. before LAB on 2/13; passed w/ amendments completely deleting affirmative defenses and requiring employers to develop anti-discrimination policies that are reviewed by DLIR
SB 1012 ref. to JDL**

HCRC position: Strongly oppose. Our current admin. rules provide strict liability (i.e., no defenses) for supervisor harassment. These rules were recently upheld by the Hawai'i Supreme Court in the *Lales* case, and the Commission recently rejected such changes to our admin. rules. *Lales* also held that individual supervisors could not be liable, so liability now rests entirely with employers. If this is a concern, HRS 378-1 should be amended to define "employer" as including agents and supervisory employees. Also don't want to define "supervisory employee" so narrowly - should also include persons who direct the day to day activities of employees. The proposed amendments would also conflict with the intent of HRS § 378-3(10), which allows an employee to bypass the HCRC complaint process and directly file a civil action for sexual harassment or sexual assault in circuit court.

Recommendation as to HD1 – support HD1, amendments re: review of policies(?)

**[HB-795] Medical Marijuana; Employment Protections
SB 1291 SD1**

Amends both HRS § 329-125 and adds a new part to HRS Ch. 378 to prohibit an employer from disciplining, suspending, discharging or discriminating against an employee solely because the employee tested positive for marijuana if the employee is a qualifying patient/user of medical marijuana, the marijuana is not used in the workplace. Prohibition does not supersede any statute, rule, employment contract, collective bargaining agreement, or workplace regulation or policy prohibiting an employee from being under the influence of marijuana while working in the workplace.

**Status: HB 795 ref. to HLT, JUD; hrg. before HLT on 2/7; decision making on 2/11;
deferred.**

SB 1291 ref. to HTH, JDL; hrg. before HTH on 2/18, passed w/amendments changing effective date only

HCRC position: **Support** and state that section 2 of bill should be deleted – protections should only be in HRS Ch. 329 and not repeated in HRS Ch. 378.

[HB 944]
SB 1113 SD1 **Background checks on employees, applicants and operators of
healthcare facilities and the state Dept. of Health**

Expands authority of DOH to conduct background checks to include criminal history record checks, adult abuse perpetrator and child abuse record checks, and certified nurse aid registry record checks for people seeking employment with the state or its contractors where the work involves direct client care in healthcare facilities.

Status: **HB 944 ref. to HLT, JUD**
SB 1113 ref. to HTH/HSB, JDL; hrg. before HTH/HSB on 2/10, deferred to 2/11,
passed w/ amendments

HCRC position: **Monitor and comment** that HCRC does not oppose criminal history record checks for positions that involve work with vulnerable populations.

HOUSING

HB 25 HD1 Discrimination in Rental Transactions; Source of Income

Amends HRS Chapter 521 (Residential Landlord Tenant Code) to prohibit discrimination in the rental of residential property based on lawful source of income.

Status: **ref. to HSG, CPC; hrg held on 2/2, passed w/ amendments changing effective date**

HCRC position: **Support.** Lawful public sources of income include Section 8 vouchers, social security disability insurance, unemployment compensation, food stamps, temporary assistance to needy families; lawful private sources of income can include special needs trusts, and income from legal settlements. The majority of people who receive rental assistance are people with disabilities, single female heads of households, families with children and members of certain minority groups. Therefore, there is a correlation between those that are protected under our fair housing law and those who receive rental assistance. 13 other states have source of income protection statutes.

HB 31 HD1 Condominiums; Medical Marijuana; Discrimination

Amends HRS Chapter 421J by voiding any condo assoc. provision that discriminates against a person who holds a valid medical marijuana certificate and resides in a condominium property regime of planned community association unless the documents prohibit smoking tobacco and the medical marijuana is used by means of smoking

Status: **ref. to HLT, CPC, JUD; hrg. held on 1/30 before HLT; decision making on 2/4, passed w/ amendments changing effective date**

HCRC position: Oppose. Exempts condo associations from HRS § 515-3 reasonable accommodation provisions that would allow smoking of medical marijuana for persons with disabilities.

PUBLIC ACCOMMODATIONS

HB 738 Misrepresentation of representing oneself as the owner or trainer of a SB 760 SD1 service dog

Amends HRS Chapter 347 to make it a misdemeanor for any person to misrepresent themselves as the owner or trainer of a service dog.

Status: HB 738 ref. to JUD

SB 760 ref. to JDL, WAM; hrg. before JDL on 2/17, passed w/ amendments clarifying that “owner” includes people authorized by dog’s owner to use the service dog and changing effective date to 2059

HCRC position: Oppose. Encourages prohibited inquiries. Also could result in arrest of people using assistance animals who might mischaracterize their animals as service dogs.

[SB-940] Exemption for religious facilities from HRS Ch. 489 HB 1337

Amends HRS Ch. 489 to exclude religious facilities owned or operated by a religious organization and used for religious purposes from definition of “place of public accommodation”.

**Status: SB 940 ref. to CPN, JDL; no hearings held
HB 1337 ref. to JUD**

HCRC position: Strongly oppose. Many religious organizations own facilities that are offered to the general public and they should not be allowed to discriminate. Also conflicts with federal Title II law that does not have such exemptions. Terms “used for religious purposes” is vague, and would require HCRC to determine whether facilities are being used for religious purposes. These facilities are already exempt under the marriage equity law from being used to solemnize same sex marriages; the exemption should not be expanded to include other forms/bases of discrimination.

OTHER CIVIL RIGHTS ISSUES

HB 631 HD1 New Birth Certificate; Gender Designation

Amends HRS §338-17.7 to change gender designation on birth certificate when statement from a licensed medical or social service provider attests that current birth certificate does not align with birth registrant’s gender identity and provides cause of action if DOH refuses to issue new birth

certificate

Status: ref. to HLT, JUD; hrg. before HLT on 2/13, deferred to 2/18, passed w/ amendments requiring affidavit from medical or social service provider and changes effective date to 2050

HCRC position: Strongly support. Related to HRS Ch. 378 prohibitions against discrimination based on gender identity and expression in that employers are to address and treat employees based on their gender identity and not their ID records; this bill enables employees to more easily change their IDs. Current law creates 2 classes of people who have to go through 2 different processes to change their birth certificates; bill would create one standard and one process.

Discussion: Commissioner Iwamoto emphasized that HD1 requirement of an affidavit instead of a written attestation was unduly burdensome, and that the written statement should be sufficient.

[HB-844] Office of Language Access; Appropriation for 3 positions to assist state and SB 926 state funded agencies in implementing language access plans

[HB-845] Office of Language Access; establishing health care interpreter
SB 904 qualification/certification system

[HB-846] Office of Language Access; Appropriation to further develop language access SB
266 resource center and multilingual website pilot project

Status: HB 844 ref. to HLT, FIN; no hearings held
SB 926 ref. to HTH, WAM; hrg. before HTH on 2/4, passed unamended
HB 845 ref. to HLT, CPC, FIN; no hearings held
SB 904 ref. to HLH, WAM; hrg. before HTH on 2/6; passed unamended
HB 846 ref. to HLT, FIN; no hearings held
SB 266 ref. to HTH, WAM, hrg. before HTH on 2/4, passed unamended

HCRC position: Strong support for all 3 OLA bills. Last session the HCRC supported these 3 bills.

HB 1160 State Religious Freedom Restoration Act

Amends HRS Ch. 7 to prohibit the state or any county from burdening a person's right to exercise religion unless burden is the least restrictive means of furthering a compelling government interest.

Status: ref. to JUD

HCRC position: Oppose. Last session HCRC opposed a similar bill because it is the strictest standard used to justify burdens on religious exercise imposed by neutral laws (such as non-discrimination laws) and would be used to strike down many laws against discrimination.

[HB-1322] Homeless Person's Bill of Rights
SB 1014 Houseless Bill of Rights

Both bills add new sections to HRS to provide homeless/houseless persons with the right to: move freely in public spaces; have equal opportunities for employment; receive emergency medical care; register to vote and vote; have personal information protected; have privacy in their personal property; receive equal treatment by state and county agencies; freely accept or decline shelter or services from any state or county agency. SB 1014 additionally adds rights to sleep in legally parked cars, manage personal finances, 24 access to hygiene facilities. May bring civil action for violations

Status: HB 1322 ref. to HUS, JUD; no hearings held
SB 1014 ref. to HSH, JDL/WAM; hrg. before HTH held on 1/31/15, passed
unamended

HCRC position: Monitor to make sure bills are not placed under HCRC jurisdiction (similar to bills introduced last session).

OTHER ADMINISTRATIVE PROCEEDURE ISSUES

SB 235 SD1 Admin. Procedure; Admin. Rules; Public Hearings

Requires state agencies to hold public hearings in the counties primarily impacted by the proposed adoption, amendment, or repeal of any administrative rule. If proposed rule is likely to have a significant monetary impact on residents or communities of a particular island, at least one public hearing must be conducted with 30 days' notice on that island.

Status: ref. to GVO/JDL, WAM; hrg. before GVO/JDL on 2/10, deferred to 2/17, passed w/
amendments

HCRC position: Support but raise concerns about added costs of having hearings on every island should be added to HCRC budget (e.g., flying at least one Commissioner and staff, etc.)

SB 784 Accessible public meeting notices

Amends HRS § 92-7 to require notices of public meetings to include contact person to request an accommodation, and requires electronic notices to be accessible unless compliance imposes an undue burden.

Status: ref. to JDL

HCRC position: Strongly support because it is important to give accessible notice to people with disabilities and violates federal law and HRS § 368-1.5.

BILLS THAT DIED

HB 1305 Employment; privacy in personal social media account

Adds new section to HRS Ch. 378 Part I to prohibit employer from requiring, requesting, or suggesting that an employee or applicant disclose username and password to access employee's or applicant's personal social media account. Exemptions if access to social media account is relevant to an investigation of employee misconduct or employee violation of other laws.

Status: ref. to LAB, JUD; no hearings held

HCRC position: **Support intent** to protect employees' privacy in personal social media accounts and amend to allow employers to investigate such accounts only for the purpose of investigating allegations of hostile work environment harassment. Urge placement in a new part of HRS Ch. 378 and provide direct cause of action in court with injunctive relief and attorneys' fees.

SB 644 False representation of animal as an assistance animal in housing

Amends HRS § 711 to make it a misdemeanor for any person to falsely represent that an animal is an assistance animal needed as a reasonable accommodation in housing.

Status: ref. to HSH/HTH, JDL; no hearings held

HCRC position: **Strongly oppose.** Housing providers can just deny the accommodation if the animal is not an assistance animal needed by a person with a disability as a reasonable accommodation. May have a chilling effect on residents who want to ask for accommodations if mistaken representations are criminalized.

HB 721 Beach access for persons with disabilities SB 762

Amends HRS Ch. 115 to require DLNR and counties to provide access to all beaches that have public restroom facilities as a "reasonable accommodation" for persons with disabilities. Access must be provided by July 1, 2016. Also states that nothing precludes the award of relief available under HRS § 489-7.5.

Status: HB 721 ref. to OMH/WAL, JUD; no hearings held
SB 762 ref. to WTL/PSM, WAM; no hearings held

HCRC position: Support but change reference to HRS 368-1.5, since beach access is a program or activity of the state and § 489-2 does not require any reconstruction or new construction.

SB 700 Exemption for non-profit corporations from HRS Ch. 489

Amends HRS Ch. 489 to exclude non-profit corporations as defined in HRS Ch. 414D (i.e., all non-profit corporations) from definition of "place of public accommodation" and exempts them from requirements of chapter.

Status: ref. to CPN, JDL; no hearings held

HCRC position: Strongly oppose. Many non-profits operate services and business that are offered to the general public and they should not be allowed to discriminate on any bases. Conflicts with federal Title II law that does not have such exemptions.

Old Business

ED Hoshijo said there was nothing new to report on *Cervelli v. Aloha Bed & Breakfast*, which remained pending before the Intermediate Court of Appeals.

On the issue of discriminatory exclusions in health plan coverage, Commissioner Iwamoto reported that informal discussions continued, with a suggestion that a change in EUTF HMSA coverage for state employees could be a good first step.

New Business

There was no new business.

Announcements

There were no announcements.

Next Meeting

The next meeting of the Commission was scheduled, for March 30, 2015, at 1:30 p.m., subject to polling of and confirmation by the Commissioners.

Adjournment